CHAPTER 4

COMPARATIVE CONSTITUTIONAL PERSPECTIVES ON RELIGION-STATE RELATIONSHIPS

I. INTRODUCTION

The relationship of religious and state institutions is in constant flux in every country, resulting in an extraordinary variety of religion-state systems across countries and over time. Sometimes there are dramatic shifts. The collapse of Soviet communism and its ripple effects in the countries of the former USSR, Central and Eastern Europe, and beyond ushered in an unparalleled period of constitutional change, including changes in the protection of freedom of religion or belief and in the structure of religion-state relations. More often, there are relatively minor changes, such as adjustment of the rules governing tax-exempt status or rules governing the presence of various types of religious activity in public settings. Changes often reflect broader patterns of thought about the appropriate relationships of religion, state, and society: Are religion and religious difference on balance good for society? Should there be freedom of religion, for religion, or from religion? The patterns that emerge reflect the influence of both dominant and minority religious traditions, broader currents in political theory and practice, the influence of leading personalities, reactions to particular events, the appeal of different arguments in different settings, and countless other currents that make up national history.

This chapter provides an introductory framework for thinking about the range of possible religion-state relationships. While it is necessary to describe the differing approaches in terms of distinctive types or models, it is important to bear in mind that no system is static, and most share features of multiple models. Nevertheless, the typology we describe provides a useful map of the types of regimes that exist in the world today.

One of the principal theses of this chapter is that religious freedom can exist in a variety of forms, though some forms are less likely to promote religious freedom than others, and of course, some are totally inconsistent with it. The aim here is to provide a framework for comparing different regimes, not only to facilitate analysis of strengths and weaknesses but, perhaps even more important, to allow deeper exploration of the ideas and commitments that varying configurations reflect.

Note that we tend to speak of "religion-state" rather than "church-state" relationships in order to be as neutral as possible. It is primarily Christian religions that have churches; other religious traditions have synagogues, mosques, temples, or other institutions. Not only are the structures used for worship different, but the overall ways of conceptualizing and organizing the relationship of religious and state institutions may be quite different. When we do lapse into the "church-state" vocabulary that has long been standard in the West, we intend for the term "church" to be understood quite broadly and inclusively to mean the institutional manifestation or organization of a religion, which may have local, regional, national, and international dimensions.

II. THE RANGE OF POSSIBLE RELIGION-STATE STRUCTURES

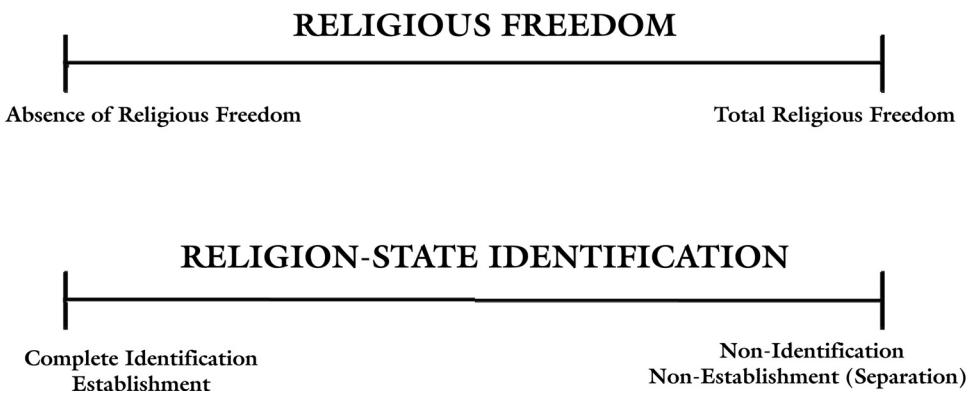
A. A COMPARATIVE FRAMEWORK FOR CONCEPTUALIZING RELIGION-STATE RELATIONSHIPS[1]

The degree of religious liberty in a particular society may be assessed along two dimensions — one involving the degree to which state action burdens religious belief and conduct (what we might describe as the religious freedom continuum), and another involving the degree of identification between governmental and religious institutions (the religion-state identification continuum). In the United States, because of the wording of the religion clause of the First Amendment of the U.S. Constitution, these two dimensions are thought of respectively as the "free exercise" and "establishment" aspects of religious liberty. But for comparative purposes, it is useful to think more broadly in terms of varying degrees of religious freedom and religion-state identification.

At least in lay thought, there is a tendency to assume that there is a straightforward linear correlation between these two values that could be represented as shown in Figure 4.1. This diagram suggests that a high degree of religious freedom correlates with a low degree of church-state identification and that a low degree of religious freedom correlates with a high degree of church-state identification. While this may capture a certain intuition about

1. This section is adapted from W. Cole Durham, Jr., A Comparative Framework for Analyzing Religious Liberty, in *Religious Human Rights in Global Perspective: Legal Perspectives* 7 (Johan D. van der Vyver & John Witte, eds., Kluwer Law International 1996).

Figure 4.1

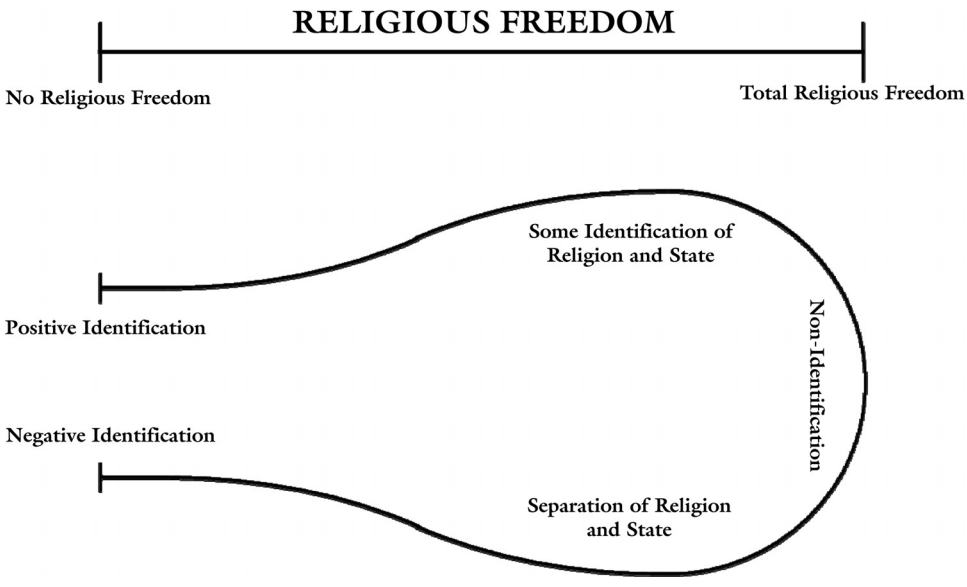


the relationship of religious freedom and church-state identification, it is an oversimplification, and in fact a misleading one. When one reviews the world's legal systems, one quickly realizes that while there are many systems for which the correlation holds true (e.g., France and the United States), there are many others for which the correlation does not hold. For example, there are regimes with established churches that have high degrees of religious freedom (e.g., the United Kingdom, Norway, and Finland), and regimes with strong separation of religion and state that rank low in religious freedom (e.g., Soviet-era Russia).

But this lack of correlation is puzzling. After all, a major reason in most countries that constitutional arrangements address the configuration of religious and state institutions is that there is an assumed correlation between institutional configurations and optimal conditions for religious life. The answer to this seeming paradox lies in reconceptualizing the religion-state identification continuum in two respects. First, it is important to recognize that the range of possible relationships runs not merely from complete identification to non-identification. In fact, the possibilities run from complete (and positive) identification through non-identification to outright hostility and persecution (i.e., negative identification). Second, in order for the correlations between institutional configurations and the religious freedom continuum to become clear, the identification continuum needs to be laid out as a loop, as shown in Figure 4.2.

What this schematization suggests is that lack of religious freedom correlates with a high degree of *either* positive *or* negative identification of the state with religion. It is fairly obvious why negative identification correlates with lack of religious freedom: state hostility toward religion and outright persecution by the state clearly give rise to a decrease in religious freedom. Moreover, it is fairly clear how positive identification with one religion will lead to diminished freedom for other religions (and also for dissenters from the dominant religion). Less obvious is that the majority religion, because it is likely to become a captive of state apparatus, may also experience a considerable diminution of its liberty. This is a major reason why the disestablishment process, which culminated in 2000 in the disestablishment of the Swedish state church, was supported by the state church itself.

Figure 4.2



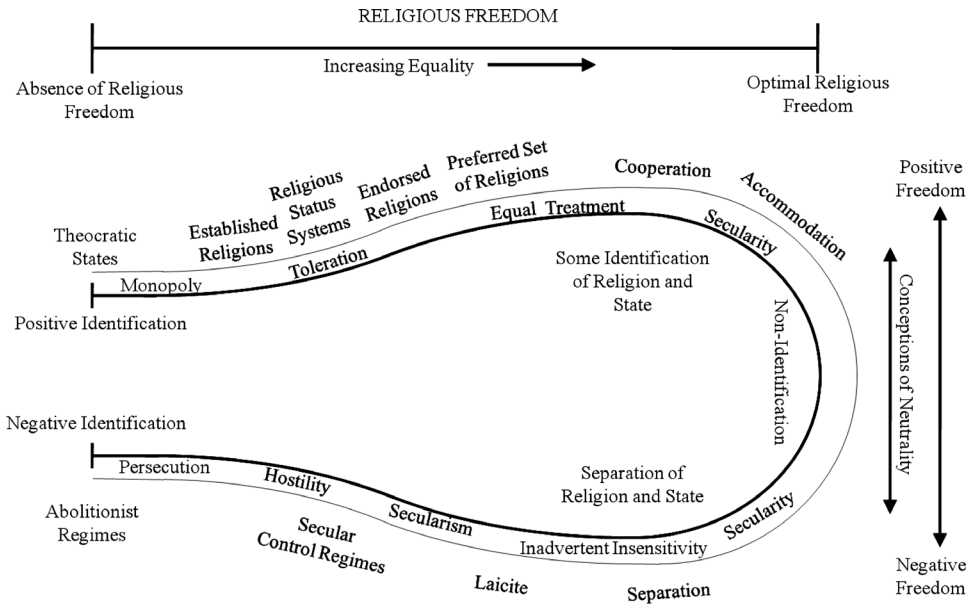
Further, this schematization clarifies that we cannot simply assume that the more rigorously one separates church and state, the more religious liberty will be enhanced. At some point, as the position of systems moves along the continuum, aggressive separationism will lead to the exhibition of hostility toward religion. Mechanical insistence on separation at all costs may push a system toward inadvertent insensitivity and ultimately intentional persecution.

The model also captures a related but less obvious reality. Changes in political regimes often move back and forth between extreme positions near the ends of the identification gradient, skipping more moderate intermediate positions. For example, the history of church-state experience in Spain over much of the past two centuries reflects radical shifts back and forth from regimes strongly supportive of an established church to secularist, anti-clerical regimes. In other settings, fundamentalist regimes may be replaced by radically secularist regimes, and vice versa. What the diagram suggests is that such shifts back and forth between radically contrasting religious and secular ideologies may not be wide pendulum swings but vacillating shifts of control between highly polarized political groupings that in fact closely resemble each other in their drive for power.

B. THE RANGE OF INSTITUTIONAL RELIGION-STATE RELATIONSHIPS

Focusing on the religion-state identification continuum, we can identify a number of recurring types of religion-state relationships. Figure 4.3 depicts a range of historical types of religion-state configurations along the identification loop. These are listed along the outer loop of the diagram: theocratic

Figure 4.3



states, established religions, religious status systems, and others. Various attitudes of the state toward religion are listed along the inner loop: monopoly, toleration, equal treatment, and so on. The various "types" will be described next.

At the outset, we reiterate that the various categories in Figure 4.3 are abstract types, and actual historical configurations are more complex and more varied. Also, we believe the outer and inner loops are elastic in the sense that various types and attitudes may "slip around" the basic religion-state identification continuum. That is, for some societies accommodation may be the type of religion-state configuration that optimizes religious freedom; for others stricter separation may be preferred. At the same time, the outer loop is not infinitely elastic: it is hard to imagine that religious status systems (upper loop) or religious control systems (lower loop) could be "pulled" around the identification continuum to be positioned at a point that correlates with optimal religious freedom. The inner loop is elastic in a different way. Attitudes such as toleration and equal treatment may be exemplified in a range of different types of regimes, and thus they may overlap. For example, accommodationist regimes are tolerant, protect substantive equality among differing religious groups, and constitute a form of secularity.

In analyzing the various types, we start at the positive end of the continuum, because in most parts of the world, the evolution has been from positive identification (i.e., official religions) to more open and often more secular systems. The question is: where along the continuum does each country and culture find the optimal configuration, and at what points at the positive and negative ends do systems move out of the domain of liberty into the zone of violation of the rights to freedom of religion or belief?

Absolute Theocracy. Beginning at the positive identification end of the continuum, one first encounters *absolute theocracies* of the type associated with stereotypical views of Islamic fundamentalism. In fact, a range of regimes are possible in Muslim theory and practice, depending on the scope given to Muslim beliefs about toleration and also depending on the extent to which flexible interpretation of Islamic law (Shari'a) leaves open normative space for adherents of other belief systems. What is significant about the absolutist positions is their claim to monopolize religious space. Certain historical forms of Christian, Hindu, and Buddhist beliefs, among others, have asserted monopolistic positions in various societies over time.

Established Churches. The next step along the church-state identification continuum would be an established or official state church. The notion of an "established church" is vague and can in fact cover a range of possible church-state configurations with very different implications for the religious freedom of dissenters and minority groups. At one extreme, a regime with an established church that is granted a strictly enforced monopoly in religious affairs may closely resemble theocratic rule. Spain, England, and many other European countries following the Peace of Westphalia in 1648 had such systems, as have countless systems in other parts of the world. Some countries that have an established religion nevertheless tolerate a restricted set of divergent beliefs. In fact, the historical pattern has been for established religions to become more tolerant over time. A country in which Islam is the official religion but that tolerates "people of the Book" is another example. A country with an established Christian church that tolerates a number of major faiths but disparages others is another. Another position is a country that maintains an established church but guarantees equal treatment for all other religious beliefs. Contemporary Great Britain is a prominent example.

Religious Status Systems. In a number of countries, multiple religions have official status in the sense that at least portions of the religious law of differing traditions are binding on those belonging to those traditions. For example, in Israel, India, and a number of countries with substantial Muslim populations, personal law (typically including laws governing marriage, family, divorce, succession, and related fields) depends on one's religious status. If one is Jewish, Jewish law applies; if Muslim, Shari'a applies; and so forth. These religiously plural systems may be more or less flexible in recognizing rights of exit from the officially recognized religious group.

See Chap. 2(IV) on Vatican II

Historically Favored and Endorsed Churches. The next category consists of regimes that fall short of formally affirming that one particular church is the official church of the nation, but acknowledge that a particular church has a special place in the country's history and traditions. This is quite typical in countries where Roman Catholicism is predominant and a new constitution has been adopted relatively recently (typically since Vatican II). The endorsed church is specially acknowledged though not made the official religion, and the country's constitution asserts that other groups are entitled to equal protection. Sometimes the endorsement is relatively innocuous and remains

strictly limited to recognition that a particular religious tradition has played an important role in a country's history and culture. In other cases, endorsement operates as a thinly disguised method of preserving the prerogatives of establishment and channeling significant state aid to the favored church (or perhaps churches) while maintaining the formal appearance of a more liberal regime.

Preferred Set of Religions. A number of regimes suggest in various ways that a certain set of religions deserve preference. Sometimes this is done by distinguishing traditional religions and giving them special status or privilege. This may also be implicit in "multi-tier" regimes that give different groups different levels of recognition. Theoretically, these multi-tier systems set out ostensibly objective criteria for differential treatment, but generally the result is the same as explicitly giving favored treatment to traditional groups.

Cooperationist Regimes. The next category of regime grants no special status to dominant churches, but the state continues to cooperate closely with churches in a variety of ways. Germany provides the prototypical example of this type of regime, though it is certainly not alone in this regard. Most European religion-state systems are cooperationist. The cooperationist state may provide significant funding to various church-related activities, such as religious education or maintenance of churches, payment of clergy, and so forth. Very often in such regimes, relations with churches are managed through special agreements such as concordats. Spain, Italy, and Poland as well as several Latin American countries follow this pattern. The state may also cooperate in helping with the gathering of contributions (e.g., the withholding of "church tax" in Germany). Cooperationist countries frequently have patterns of aid or assistance that benefit larger denominations in particular. However, they do not specifically endorse any religion, and they are committed to affording equal treatment (as they understand equality) to all religious organizations. Since different religious communities have different needs, cooperationist programs can raise more complex interdenominational problems of equal treatment. It is all too easy to slip from cooperation into patterns of state preference. Also, in comparison with more separationist regimes, more complex questions of protecting the self-determination and internal autonomy of religious organizations arise.

Accommodationist Regimes. A regime may incline toward separation of religion and state, yet retain a posture of benevolent neutrality toward religion. Accommodationism might be thought of as cooperationism without the provision of any direct financial subsidies to religion or religious education. An accommodationist regime would have no qualms about recognizing the importance of religion as part of national or local culture; accommodating religious symbols in public settings; allowing tax, dietary, holiday, Sabbath, and other kinds of exemptions; and so forth. Note that the growth of the state intensifies the need for accommodation. As state influence becomes more pervasive and regulatory burdens expand, refusal to make religious exemptions or accommodations shades into state hostility toward religion.

Separationist Regimes. The slogan "separation of church and state" can be used to cover a fairly broad and diverse range of regimes. At the benign end, separationism differs relatively little from accommodationism. The major difference is that separationism, as its name suggests, insists on more rigid sequestration of religion and state. Any suggestion of public support for religion is deemed inappropriate. Religious symbols in public displays are not allowed. Granting religion-based exemptions from general public laws is viewed as impermissible favoritism toward religion. The mere reliance on religious premises in public argument may be deemed to run afoul of the church-state separation principle. Members of the clergy are not permitted to hold public office.

Less benign forms of separationism make stronger attempts to cordon off religion from public life. In many contexts, the practical problems arise from inadvertent insensitivity. Regulations as initially formulated often lack anti-religious animus; those drafting the regulations were simply unaware of the religious implications of their regulations. At some point, those afflicted by the unintended burden bring the problem to the attention of government officials. The question then becomes whether reasonable accommodations can be worked out; if so there is a shift toward an accommodationist system, or officials may believe they lack authority to make such accommodations. Inadvertent insensitivity is the flip side of the subtle or not-so-subtle privileging of groups in cooperationist regimes.

One of the questions posed by separationist regimes is the extent to which religion should have a public role. Note that even if religious communities do not have an official or endorsed role in the state sphere, they could still have a significant public role, assuming that the public sphere is broader than the sphere of the state. Recent years have witnessed a significant resurgence of religion in public life, and there are significant issues about what is permissible and appropriate, and indeed, when discrimination or deprivation of rights occurs if some public role is not allowed. On the other hand, if the aim is to separate public and private life into non-overlapping spheres, and to limit religion to the private sphere, then as the public sphere of the welfare state expands, the space available for religion can shrink substantially. One form this can take is a tightening of the state monopoly on charitable, educational, social, and other welfare services. "Separation" in its most objectionable guise demands that religion retreat from any domain that the state desires to occupy, but is untroubled by intrusive state regulation and intervention in religious affairs.

Secular Control Regimes. A control regime shares some surface similarities with established and historically favored religions and cooperationist regimes. But here the goal is more explicitly to use religion for the state's own ends, or to emphasize freedom *from* religion for ideological reasons, or to try to limit the possibility that churches will become a threat to the ruling coalition or a competing source of popular legitimacy within the society. Established church regimes can also be a type of control regime, but in recent years, secular control regimes have been particularly problematic.

Abolitionist States. At the negative end of the identification continuum are regimes that have the overt goal of eliminating religion as a social factor.

Albania during the Soviet era is perhaps the foremost example of this approach. Historically, a more common pattern has been to subject strong religions to control while seeking to eliminate or drive minority groups from a country. The Holocaust is the most horrendous example. Less extreme are situations involving overt persecution, hostility, or discrimination.

Besides identifying and plotting a range of different types of religion-state regimes, the schematization in Figure 4.3 is helpful in bringing out a number of other points about religion-state relations. First, while there are important differences between religious freedom and religious equality (e.g., one can imagine a society in which everyone is treated equally in that all are allowed no religious freedom), the general trend is that increasing equality and increasing freedom of religion go together.

Second, as suggested by the arrow at the far right of the diagram, differing types of free regimes may reflect differing conceptions of freedom. Cooperationist regimes reflect a positive conception of freedom, in that they assume that the state should help actualize the conditions of freedom, such as by providing funding. Separationist regimes, in contrast, assume a negative conception of freedom according to which religious freedom is maximized by minimizing state intervention.

Third, different regime types among the cooperationists reflect differing assumptions about the neutrality of the state. One model of neutrality is state inaction. A second model is neutrality as the impartiality of an unbiased umpire. As applied to religious matters, this model requires that the state act in formally neutral and religion-blind ways. A third model views the state as the monitor of an open forum. The state in this model can impose time, place, and manner restrictions on the marketplace of ideas, and can impose certain constraints to avoid violence and fraud; but otherwise the state plays a minimalist role. The first three models support varying versions of separationism. A fourth model of neutrality calls for substantive equal treatment. That is, the basic principle is that similarly situated individuals should be treated equally, but substantive differences of position should be taken into account, and conscientious beliefs are relevant differences that should be accommodated. This model of neutrality correlates with the principles of an accommodationist regime. A fifth model is a "second generation rights" version of the fourth. That is, it views actualization of substantive rights as an affirmative or positive obligation of the state, and thus supports cooperationist regimes. Most credible religion-state regimes that are sensitive to human rights concerns inhabit a range somewhere in the neutralist zone, as defined by at least one of the foregoing conceptions of neutrality.

Fourth, a word should be said about the contrast between secularism and secularity. Both ideas are linked to the general historical process of secularization, but as we use the terms, they have significantly different meanings and practical implications. By "secularism" we mean an ideological position that is committed to promoting a secular order. By "secularity," in contrast, we mean an approach to religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that provides a neutral framework capable of accommodating a broad range of religions and beliefs. In fact, in most modern legal systems, there are

exponents of both types of views. Constitutional and other legal texts addressing religion-state issues can often be interpreted as supporting one or the other of these views, and in fact, some of the key debates turn on the difference between these two approaches. Historically, French *laïcité* is closer to secularism; American separationism is closer to secularity. But there are debates in both societies about how strictly secular the state (and the public realm) should be. This tension between two conceptions of the secular runs through much of religion-state theory in contemporary settings.

COMMENTS AND QUESTIONS

1. What category or group of categories most accurately describes the situation in your home country or in countries with which you are familiar?
2. How might perceptions of whether a given system has a high degree of religious freedom vary if you are part of a religious majority as opposed to a religious minority? What if you are a non-believer, or someone whose identification with a particular religious tradition is primarily cultural rather than a matter of faith? What if you are halfhearted, uncommitted, or uncertain about your religious commitments? For example, if you are live in a cooperationist regime, how might your views about the value of cooperation vary if you belong or don't belong to a favored group? Should our preference be the same regardless of our own personal commitments to, about, or against religion? Or does where we stand inevitably depend upon where we sit?
3. Majority religious groups often argue that they should receive special treatment or recognition, based on their historical or contemporary contributions to a society. Sometimes these arguments for special treatment look a lot like the arguments that industrial monopolists make in favor of protecting their monopolies. Do they seem valid, or merely self-serving? Is it dominant majorities who need special treatment, or minorities? Or should special accommodations be made for both?

Additional Web Resources:	More extensive materials relating to each type of religion-state regime

III. POSITIVE IDENTIFICATION REGIMES

It is not possible in the space constraints of this volume to explore each type of religion-state relation in detail. In what follows, we focus primarily on the portion of the religion-identification continuum lying between cooperation and *laïcité*, inasmuch as most major democratic systems fall in this range. Some attention is paid to alternative regimes in extended notes as a reminder of the conditions that can arise as a state moves too far away from non-identification.

Italian Law Professor Silvio Ferrari maintains that cooperationist regimes are the dominant pattern in Europe. In his view, these systems have the following features: "substantial respect of individual religious freedom, guarantee of the autonomy and, in particular, the self-administration of the religious denominations, and selective collaboration of the states with the churches."[2] The "selective collaboration" often includes funding but can also include collaboration in other spheres, such as education. In a sense, established or endorsed church models are becoming functionally very much like cooperationist systems. Established church regimes in most Western European countries have become so tolerant and equalitarian that that they have become difficult to distinguish from cooperationist regimes, with the exception that as a formal matter they still privilege one (or more) religion(s). Thus, there is an established church in Norway, but all denominations who so desire receive support in proportion to their membership, and the humanists receive a comparable share. At the other extreme, even laicist France allows substantial funding to cover maintenance of churches with historical value and to support teaching of secular subjects in private religiously affiliated schools. An interesting question is whether even the United States, with the recent loosening of Non-Establishment Clause barriers to various types of funding, is converging to some extent with cooperationist models.

A. THE SPANISH EXPERIENCE

Spain provides a particularly interesting case because it has made the transition quite successfully from being a clear example of a regime with a very strong and exclusive established church linked to an authoritarian regime to a cooperationist system situated in a democratic setting (with some residual "endorsed church" characteristics).

Through much of its history, Spain was the classic example of an established Church. Starting in the late fifteenth century with the creation of the modern Spanish state, nationality was fused with religious affiliation. To be Spanish was to be Catholic. Persecution of religious minorities was a state-supported activity, and as a consequence, religious minorities were almost unknown until early in the twentieth century, with the exception of small Muslim and Jewish communities that survived the Reconquista but remained largely hidden away from the public view. Beginning with the French Revolution and its spillover effects in Spain, and continuing through the nineteenth and twentieth centuries, Spanish politics vacillated wildly between pro-Church and anti-Church laicist regimes. The transition to a modern democratic regime began even before Franco's death. With the change in Church attitude signaled by the Second Vatican Council on church-state issues, the Spanish bishops and the Holy See began to pressure the Franco regime for more religious freedom, leading to a 1967 law granting real freedom for religious minorities despite a reluctant Franco.

2. Silvio Ferrari, Conclusion: Church and State in Post-Communist Europe 421, in *Law and Religion in Post-Communist Europe* (Silvio Ferrari and W. Cole Durham, Jr., eds., Peeters 2003).

The Web Supplement includes the concordats, the LOLR, and the agreements with Protestant, Jewish, and Islamic groups.

After Franco's death the Church continued to lobby for greater religious freedom, but at the same time sought to protect some aspects of its traditional position by a concordat entered into on July 28, 1976. This was supplanted by another concordat that was negotiated essentially in tandem with the drafting of the 1978 Spanish Constitution and was signed January 3, 1979, just one week after promulgation of the Constitution. A year and a half later, the Spanish Parliament adopted the 1980 Organic Law on Religious Freedom (Ley Orgánica de Libertad Religiosa, or LOLR), which laid the foundation for cooperation agreements modeled to some degree on the 1979 concordat. Based on the LOLR, agreements between the Spanish state and three federations of religious communities (Protestant, Jewish, and Islamic) were entered into in 1992. The theory of the LOLR is that the Spanish church-state system has four fundamental "informing principles" (principios informadores): (1) religious freedom, (2) equality, (3) state neutrality, and (4) state cooperation with churches and religious communities. Thus, within a relatively few years, Spain successfully made the transition from an authoritarian state-church system to a democratic cooperationist regime.[3] The aim of the transition, which has brought major benefits to most religious groups, was to bring others "up to" the level of the Roman Catholic Church. The difficulty in Spain (and in many other cooperationist regimes) is that the intended upward equalization does not always trickle down to the full range of smaller religious groups. One arena in which this is often visible is the tax system, as suggested by the following European Commission case.

Ortega Moratilla v. Spain

European Commission of Human Rights, App. No. 17522/90,
Eur. Comm'n H.R. (11 January 1992)

[In June 1985, the applicants, an evangelical Protestant church and minister, requested exemption from property tax in respect of their place of worship in Valencia, arguing in particular that the Catholic Church enjoyed such exemption. The tax office refused this request on the ground that the exemption enjoyed by the Catholic Church was provided for in the concordat between Spain and the Holy See signed in 1979, whereas there was no legal basis for granting the applicants such exemption. The applicants then appealed this decision, losing at all levels in the domestic legal system. After thus exhausting domestic remedies, they applied for relief to the European Commission of Human Rights.]


Full Text

The Law

1. The applicants complain in the first place that levying property tax in respect of the premises they use for worship infringes their right to freedom of religion set forth in Article 9 of the Convention. . . .

The Commission notes that under the terms of this provision the right to freedom of religion includes the right to manifest one's religion, in public or in

3. For a fuller account of Spanish developments, see Javier Martinez-Torron, Religious Freedom and Democratic Change in Spain, 2006 *BYU L.Rev.* 777.

private, in worship or observance. The possibility of possessing premises open to adherents and used for the above purposes is clearly one of the means of exercising this right. However, the Commission fails to see how a right to exemption of places of worship from all forms of taxation can be derived from Article 9 of the Convention. It considers that the right to freedom of religion by no means implies that churches or their adherents must be granted a different tax status from that of other taxpayers. . . . It follows that in this respect the application is manifestly ill founded and must be rejected pursuant to Article 27 para. 3 of the Convention.

2. The applicants further allege that, as the Catholic Church in Spain enjoys exemption from property tax in respect of places of worship, the refusal of their request to be treated in the same way for tax purposes infringes Article 14 of the Convention in conjunction with Article 9.

Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex. race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

However, the Commission recalls that this provision does not prohibit all differences in treatment in the exercise of the rights and freedoms recognised, equality of treatment being violated only where the difference in treatment has no objective and reasonable justification. . . .

The Commission notes that the Freedom of Religion Act (Institutional Act No. 7/1980) [LOLR] authorises agreements between the State and the various churches or religious associations according to the number of their adherents and the beliefs of the majority of Spanish citizens. It observes that the tax exemptions enjoyed by the Catholic Church in Spain are provided for by the agreements concluded on 3 January 1979 between Spain and the Holy See, which place reciprocal obligations on the two parties. For example, the Catholic Church has undertaken to place its historical, artistic and documentary heritage at the service of the Spanish people (Agreement on education and cultural affairs, Article XV). On the other hand, its places of worship enjoy tax exemption (Agreement on economic affairs, Article IV).

However, the applicant church has not concluded such a concordat with the Spanish State, and it does not appear from the file that it has sought to do so. Consequently, it does not have the same obligations to fulfil vis-à-vis the State.

It follows that this complaint must be rejected as being manifestly ill founded within the meaning of Article 27 para. 2 of the Convention.

COMMENTS AND QUESTIONS

1. The Commission's analysis appears to be a simple application of the maxim that it is not discriminatory for dissimilar situations to be treated differently. Is this a fair characterization of the situation here? Does it make sense to afford special privileges in exchange for special obligations? Why are the Catholic Church and the petitioner not similarly situated?

2. Not long after decision of the foregoing case, many Protestant churches formed a federation that entered into an agreement with the government, authorizing tax exemptions for religious property. Suppose another non-Catholic religious group, one that is denied membership in this federation, brings a claim for an exemption from property tax. Would such a group have a stronger Article 14 claim?
3. What factors would constitute "objective and reasonable justifications" for differential treatment in such circumstances.

B. GERMAN EXPERIENCE: ISSUES SURROUNDING "CHURCH TAX"

See Chap. 12(II.C) on German Church Tax

A prominent example of cooperationism in the German legal system is the so-called church tax. This "tax" is often misunderstood; to the normal taxpayer, it looks like an amount withheld from earnings along with other taxes that are collected as part of the state tax system. The legal reality is somewhat different. Many churches have the status of "corporations under public law." Churches with this status are eligible to, among other things, levy the church tax on their members. As Professor Gerhard Robbers describes it,

> This tax functions like a membership fee. Those churches that do tax their members usually levy a tax of eight or nine percent of what the member pays in state income taxes. Some of the taxing churches use the state's taxation system, i.e., the state machinery collects the church tax. For this service, a church pays four to five percent of its tax revenue to the state. Indeed, the church tax system was introduced to de-establish former state churches in the nineteenth century and to force them to depend on their own income. The institution of church taxes is thus a consequence of state neutrality.[4]

Significantly, it is now well established as a result of constitutional court decisions that an individual who resigns his or her membership in a church may no longer be compelled to pay the church tax. Such resignations are common when taxes are due, although the numbers are not overwhelming. Most Germans continue to pay the church tax. Note that the tax is channeled to the church with which the individual is affiliated. The tax system is not used to coerce an adherent of one belief system to support the beliefs of some other group or groups. Many smaller religious communities have the status of a "corporation under public law." While they are theoretically entitled to participate in the church tax system, few do so. The decision not to take the funds is often a matter of religious principle. Despite these basic protections, problems occur, as suggested by the following cases.

Mixed-Marriage Church Tax Case

German Federal Constitutional Court, 19 BVerfGE 226 (1965)

[Baden-Württemberg's Church Tax Act provided that all employees are subject to a church tax on wages if they or their spouses belong to a religious

4. Gerhard Robbers, Religious Freedom in Germany, 2001 *BYU L. Rev.* 643, 651.

association authorized to tax. The result was that in mixed-faith marriages, one of the spouses who was not a member of the relevant church might end up paying taxes to that church. The First Senate of the Federal Constitutional Court decided as follows:]

Section 6(2) of the Church Tax Act violates the fundamental right of an employee who is not a member of a religious association as derived from Article 2(1) of the Basic Law [which provides that "[e]veryone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code."] . . . [Under the Tax Act, an] employee is required to pay the church tax simply because his spouse is a church member. Thus, because of the state law, the employee must pay the church tax although he does not belong to a church authorized to tax him.

As this court has said, a law may not be viewed as part of the constitutional order if it obligates a person to pay financial benefits to a religious association of which he or she is not a member. Because the nonmember employee has no legal way of avoiding this tax liability, the Church Tax Act impermissibly interferes with his right to personality under Article 2(1) of the Basic Law. . . .

The argument is erroneous that subjecting the nonmember spouse to the church tax may be justified because of the nature of marriage as a permanent union of the partners into a complete community of all aspects of life.

In a mixed-faith marriage, no community exists in the exact areas being considered — i.e., religious convictions and beliefs. The marital community is not based upon mutual recognition of religious articles of faith, values, and obligations. Consequently, it would be unreasonable and would contradict the libertarian constitutional system of the Basic Law if one wished to force the nonmember spouse to establish direct relations — even if only financial ones — to a religious community by imposing unavoidable legal sanctions. If, as the Federal Constitutional Court and the Federal High Court of Justice have said, each partner may believe what he chooses and may even convert to another religious belief without being guilty of a marital transgression, then one partner's connection with a church does not obligate the other partner. Hence it is impermissible to argue that because the nonmember spouse made the decision to marry his spouse he should not assert a violation of his religious freedom when he is forced to pay his spouse's church tax obligation. Each partner must decide if he wants and is able to make concessions in religious and ideological matters. The tolerance that married persons of different faiths owe one another may not lead to the creation of legal ties to third parties, especially not to churches and other religious associations.[5]

5. Translation from Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 487-488 (2d. ed., Duke Univ. Press 1997).

Church Tax After Resignation of Church Membership Case

German Federal Constitutional Court, 44 BVerfGE 37 (1977)


Full Text

[§1.2 and §2.1 of the Prussian Resignation of Church Membership Act, which had continued effectiveness in various parts of Germany at the time of the action, provided:

> §1.2 The legal effects of the declaration of resignation of church membership shall start to apply one month after its receipt by the Local Court; until then, the declaration may be withdrawn in the form prescribed in No. 1.
>
> §2.1 The effect of the declaration of resignation of church membership on the person resigning shall be his permanent release from all and any payments based on his personal membership of the religious society. Release shall apply from the end of the ongoing fiscal year, but not before expiry of three months following submission of the declaration.

Provision of the German Basic Law referred to in the court's opinion are included in the Web Supplement.

A number of parties challenged the application to them of this provision after they had resigned their church membership. The court reasoned as follows:]

Continuing to levy church tax after their resignation of membership had become effective was . . . said to violate the complainants' fundamental right to freedom of religion. They were thereby allegedly coerced to financially support a religious society whose creed they no longer shared, and whose religious and charitable activities they rejected. Freedom of religion was not guaranteed without restriction despite the lack of a constitutional requirement of the specific enactment of a statute; in accordance with the principle of the unity of the constitution, however, it could be restricted to protect other freedoms and rights guaranteed by the Basic Law. The interests of religious communities equipped by the Basic Law with special rights could not justify the provision contained in §2.1 sentence 2 of the Prussian Resignation of Church Membership Act, however. Neither the interest of the churches in ordered budgeting, nor administrative aspects required the subsequent taxation provided by §2.1 sentence 2 of the Prussian Resignation of Church Membership Act. In light of the relatively small number of resignations of church membership, the church's budgets could not become unbalanced if church tax liability ceased to apply as soon as the declaration of resignation of church membership became effective; the churches could be expected to include in the calculations of their budget planning any resignations of membership in the same way as a reduction in church tax revenue resulting from death or from members leaving gainful employment. . . . A purely fiscal interest of the churches could not justify the impairment of the freedom of religion of the persons resigning. . . . [The Court concluded that a brief subsequent taxation period after resignation of membership might be allowed "such that, if resignation of membership is notified to the agency retaining the church tax without delay, it becomes possible to avoid overpayments and resultant refund claims, which are frequently for very small amounts." However, periods as lengthy as those contemplated by §2.1 sentence 2 were incompatible with the Basic Law.]

The concrete scope of freedom of faith and freedom to profess a belief . . . only emerges from the connection between Article 4.1 of the Basic

Law ["Freedom of faith, of conscience, and of creed, religious or ideological, shall be inviolable."] and those provisions restricting this freedom. Since Article 4.1 of the Basic Law, in contradistinction to Article 135 of the Weimar Constitution, does not contain a requirement of the enactment of a specific statute, a (constitutive) restriction by statute or on the basis of a statute is not permissible. In accordance with the unity of the constitution . . . the freedoms guaranteed in subsections 1 and 2 of Article 4 of the Basic Law may only be restricted by other provisions of the Basic Law. . . . Statutory provisions restricting the freedom guaranteed in Article 4.1 of the Basic Law can only be valid in face of the Basic Law if they prove to be an expression of a restriction by the constitution itself. If the Basic Law does not permit one to recognize such a restriction, this means an unauthorized encroachment on freedom of faith and freedom to profess a belief if the state holds to their membership a person wishing to resign membership beyond the time of the declaration of their resignation of church membership which is valid under state law. The same applies if the state does not maintain membership as such, but does uphold church tax liability. Only those persons who belong to a church entitled to levy tax may be subject to church tax liability. . . .

[§1.2 was originally enacted in 1920 to introduce a "consideration period" before resignation of church membership went into effect. The court first described the grounds for such a period, and then analyzed whether such a consideration period could be sustained.]

Resignation of church membership is said to be a particularly important act having a profound impact on the life of the person resigning membership and requiring considerable consideration. The declaration of resignation of church membership was in many cases submitted in the heat of the moment. For this reason, a certain period of calm consideration of the step taken and its consequences was alleged to be required. This did not constitute an impairment of freedom of conscience. Anyone who was firm in their decision would also remain steadfast during the consideration period, and would not be subject to external influences. If a person took back the declaration of resignation of church membership during the consideration period, this was an indication that their decision to break with the religious society had not been firmly established, and they would have been prevented from making a rash decision. . . . The state had an interest in preventing mass resignations of church membership. Since the churches concerned had been given precedence over other associations by being awarded the status of a corporate body under public law, the state was said to have demonstrated its interest in membership of a corporate body awarded such precedence by linking resignation of membership to a condition which ultimately placed no one under compulsion. The church would violate its duty if it did not try to communicate with those wishing to resign membership, but would not hear about the resignation if there was no consideration period. . . .

In application of the Basic Law, these considerations are no longer suitable to offer feasible constitutional reasons for the restriction of freedom of faith and freedom to profess a belief linked to the consideration period of §1.2 of the Prussian Resignation of Church Membership Act. The concept on which they are based, namely that the state should ensure welfare in faith-related matters,

and seek to prevent rash, potentially far-reaching decisions, is alien to the Basic Law. In accordance with Article 4.1 of the Basic Law, decisions on matters related to faith, to profession of a belief and to conscience are solely a matter for the citizen; hence the latter must themselves bear the risk of a potentially rash decision. Equally, it cannot be a matter for the state today by introducing a consideration period to open up the possibility to take back the declaration of resignation of church membership. The person resigning membership can re-enter the church at any time without state action being necessary; whether the church takes them back as a member in accordance with church law is a matter of its right of self-determination as far as the state is concerned, and hence not a matter for state influence. . . . [Public corporation status] does not justify any different evaluation. It has nothing to do with the consideration period. Finally, it cannot be up to the state by providing for a consideration period to enable the churches to consult with the person resigning membership and to try to clarify any misunderstandings or to provide pastoral care to the person resigning membership. This is however understandably and undeniably in the interest of the churches. Having said that, the former link between the state and the church, on which such action to ensure the welfare of the churches was based, no longer corresponds to the state church order constituted by the Basic Law, which is based on the one hand on the religious and ideological neutrality of the state, and on the other on the independence of the churches. . . .

Since, therefore, the consideration period in the event of resignation of church membership cannot be traced back to a restriction of freedom of faith and freedom to profess a belief by the Basic Law itself, §1.2 of the Prussian Resignation of Church Membership Act is incompatible with Article 4.1 of the Basic Law.

COMMENTS AND QUESTIONS

The German church tax decisions take great care to ensure that church tax liabilities will not be imposed on those who have resigned church membership. Is the system as circumspect in avoiding the imposition of more subtle pressures to conform and accept the obligations? That is, does the willingness to cooperate depend on coercive pressures?

C. PROVISIONS OF THE 2005 IRAQI CONSTITUTION

A wide variety of countries have majority Muslim populations. The legal systems in those states, and the extent and ways in which they incorporate Islamic law into their legal systems, vary widely. Here we address only Iraq, an unusual case because it adopted a new constitution while under foreign occupation, but one that nonetheless presents in stark form issues faced in a number of Muslim countries.

Within the Iraqi Constitution adopted in 2005, the key provision on the relation of religion and the state is found in Article 2, which provides as follows:

> Article 2: First: Islam is the official religion of the State and it is a fundamental source of legislation:
>
> A. No law that contradicts the established provisions of Islam may be established.

B. No law that contradicts the principles of democracy may be established.

C. No law that contradicts the rights and basic freedoms stipulated in this constitution may be established.

Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice such as Christians, Yazedis, and Mandean Sabeans.

Religious rights are addressed in-depth in Section Two, "Rights and Liberties." Articles 14 and 29 in Chapter One address the part religion should play as a civil right. In Chapter Two, "Liberties," Articles 39, 40, and 41 deal with issues relating to freedom of religion or belief.

See the Web Supplement for articles about the Iraqi Constitution.

Article 14: Iraqis are equal before the law without discrimination based on gender, race, ethnicity, origin, color, religion, creed, belief or opinion, or economic and social status.

Article 29: First:

A. The family is the foundation of society; the State preserves its entity and its religious, moral and patriotic values.

Article 39: Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices. This shall be regulated by law.

Article 40: Each individual has freedom of thought, conscience and belief.

Article 41: First: The followers of all religions and sects are free in the:

A. Practice of religious rites, including the Husseini ceremonies (Shiite religious ceremonies).

B. Management of the endowments, its affairs and its religious institutions. The law shall regulate this.

Second: The state guarantees freedom of worship and the protection of the places of worship.

At the end of the Rights and Liberties Section, Article 44 stands as a type of "limitations clause" that could have significant implications for the legislature and the judiciary as they attempt to interpret the articles dealing with religious liberty.

Article 44: There may not be a restriction or limit on the practice of any rights or liberties stipulated in this constitution, except by law or on the basis of it, and insofar as that limitation or restriction does not violate the essence of the right or freedom.

COMMENTS AND QUESTIONS

Is Article 2 coherent? Some have criticized this framework as providing something for everyone, including Islamists who would enforce a strict version of Shari'a and those concerned with human rights. Others have praised the framework as a remarkable example of politics being the art of the possible, skillfully leaving certain conflicts for a later day and providing a framework for liberalizing trends. What do you think?

Additional Web Resources:	Materials on constitutional provisions dealing with freedom of religion or belief in countries with Muslim majorities

IV. NON-IDENTIFICATION: THE TENSION BETWEEN ACCOMMODATION AND SEPARATION

A. THE ACCOMMODATION/SEPARATION DEBATE IN THE UNITED STATES

The United States' system of government has been characterized from the beginning of its constitutional history by freedom of religion and a particularly strict mode of institutional separation of state and religious institutions, at least on the national level. The U.S. situation is somewhat distinctive in that there are two constitutional provisions relating to religion: the Establishment Clause, which states, "Congress shall make no law respecting an establishment of religion," and the Free Exercise Clause, which states that Congress shall make no law "prohibiting the free exercise" of religion. In contrast, international norms protecting freedom of religion or belief lack a requirement of institutional separation of religion and state, and provide only "free exercise"–type protections, presumably because many of the world's legal systems do not insist on institutional separation of church and state.

But the United States' system is not as distinctive as it might initially seem. A number of other countries, including Australia, Japan, and the Philippines, have provisions modeled after the Establishment Clause. Second, many jurisdictions have provisions that emphasize the secular character of the state. This is common in both the Francophone and formerly communist parts of the world, even where the prevailing religion is Islam. Third, virtually all modern constitutions protect equality rights. These may, of course, be interpreted in very different ways, but one of the common functional effects is to limit discrimination against individuals and groups on the basis of religion, and this will often operate to reduce the privileging of favored or established religious groups. Fourth, religious freedom rights are generally understood to include rights of religious groups to autonomy in their own affairs. This necessarily implies some measure of institutional separation and non-entanglement, which amounts functionally to non-establishment. Finally, many countries have constitutional provisions calling for separation of religious and state institutions with differing degrees of harshness, from relatively benign provisions to those evincing hostility or persecution, such as those of many of the formerly communist regimes.

To a significant extent, the history of church-state relations in the United States has been dominated by an ongoing dialectic between two streams of thought about what the Establishment Clause means. On one side is a

separationist stream, symbolized by Thomas Jefferson's "wall of separation between Church & State". On the other side is an accommodationist stream, illustrated by such texts as early presidential proclamations regarding Thanksgiving holidays, a generally friendly posture toward religion, and the willingness to grant exemptions to account for religious difference.

While the Establishment Clause dates back to the adoption of the Bill of Rights in 1791, virtually all of the case law under the Establishment Clause has been decided since 1947, when the Supreme Court handed down Everson v. Board of Education, 330 U.S. 1 (1947), and held for the first time that the federal Establishment Clause was applicable to the states. The tension between the separationist and accommodationist paradigms that has occupied much of the subsequent Establishment Clause litigation is prefigured in *Everson*. The question in the case was whether a school board could subsidize school bus transportation for children attending private religious schools.

This case provides an important illustration of the complicated nature of the separation versus accommodation debate. The first half of Justice Black's majority opinion sounds very separationist, but somewhere in the middle of the opinion he changes direction, and the second half is accommodationist. As you read the opinion, pay careful attention to the rhetoric that Justice Black uses in each part of the decision. Remarkably, Black's opinion contains the seeds of nearly all the arguments that would be made in the subsequent 50-year struggle over separationist and accommodationist readings of the Establishment Clause.

Everson v. Board of Education

Supreme Court of the United States, 330 U.S. 1 (1947)

Mr. Justice Black delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. . . .

The appellant contends that the statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

The New Jersey statute is challenged as a "law respecting an establishment of religion." The First Amendment, as made applicable to the states by the Fourteenth Amendment, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These

words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Whether this New Jersey law is one respecting the "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. . . . Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown . . . authorized individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old world practices and persecutions. . . .

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. . . . Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion

did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia, and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson. The preamble to that Bill stated among other things that ". . . to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern."

And the statute itself enacted

> That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . .

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states. Most of them did soon provide similar constitutional protections for religious liberty. But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups. . . . [Nonetheless, there] is every reason to give . . . broad interpretation to the "establishment of religion" clause.

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state

statute down if it is within the state's constitutional power even though it approaches the verge of that power. New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual [members of any faith], because of their faith, or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. . . . Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Affirmed.

[Separate dissent by Justice Jackson has been omitted.]

Mr. Justice RUTLEDGE, with whom Mr. Justice FRANKFURTER, Mr. Justice JACKSON and Mr. Justice BURTON agree, dissenting.

I cannot believe that [Jefferson] . . . could have joined in this decision. Neither so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth. . . .

This case forces us to determine squarely for the first time what was "an establishment of religion" in the First Amendment's conception; and by that measure to decide whether New Jersey's action violates its command.

Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question. . . .

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes. . . .

The climactic period of the Virginia struggle covers the decade 1776-1786, from adoption of the Declaration of Rights to enactment of the Statute for Religious Freedom. The climax came in the legislative struggle of 1784-1785 over the Assessment Bill. This was nothing more nor less than a taxing measure for the support of religion, designed to revive the payment of tithes suspended since 1777. So long as it singled out a particular sect for preference it incurred the active and general hostility of dissentient groups. It was broadened to include them, with the result that some subsided temporarily in their opposition. As altered, the bill gave to each taxpayer the privilege of designating which church should receive his share of the tax. In default of designation the legislature applied it to pious uses. But what is of the utmost significance here, in its final form the bill left the taxpayer the option of giving his tax to education.

Madison was unyielding at all times, opposing with all his vigor the general and nondiscriminatory as he had the earlier particular and discriminatory assessments proposed.

As [Madison's historic Memorial and] Remonstrance discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the

scope of civil power either to restrain or to support. Denial or abridgment of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference. "Establishment" and "free exercise" were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom. In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation.

In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. . . .

Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies. Test oaths and religious qualification for office followed later. These things none devoted to our great tradition of religious liberty would think of bringing back. Hence today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function. . . .

The funds used here were raised by taxation. The Court does not dispute nor could it that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not "support" in law. But Madison and Jefferson were concerned with aid and support in fact not as a legal conclusion "entangled in precedents." Remonstrance, Par. 3. Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching. . . .

Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. . . .

Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. . . .

In these conflicts wherever success has been obtained it has been upon the contention that by providing the transportation the general cause of education, the general welfare, and the welfare of the individual will be forwarded; hence that the matter lies within the realm of public function, for legislative determination. State courts have divided upon the issue, some taking the view that only the individual, others that the institution receives the benefit. A few have recognized that this dichotomy is false, that both in fact are aided.

[T]he [majority] opinion concedes that the children are aided by being helped to get to the religious schooling. By converse necessary implication as well as by the absence of express denial, it must be taken to concede also that the school is helped to reach the child with its religious teaching. The religious enterprise is common to both, as is the interest in having transportation for its religious purposes provided.

This is not therefore just a little case over bus fares. In paraphrase of Madison, distant as it may be in its present form from a complete establishment of religion, it differs from it only in degree; and is the first step in that direction.

The problem then cannot be cast in terms of legal discrimination or its absence. This would be true, even though the state in giving aid should treat all religious instruction alike. Thus, if the present statute and its application were shown to apply equally to all religious schools of whatever faith, yet in the light of our tradition it could not stand. . . . The person who embraces no creed also would be forced to pay for teaching what he does not believe. Again, it was the furnishing of "contributions of money for the propagation of opinions which he disbelieves" that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires, not comprehensive identification of state with religion, but complete separation. . . .

The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

The judgment should be reversed.

COMMENTS AND QUESTIONS

1. Nearly every argument found in Establishment Clause jurisprudence over the subsequent half century is prefigured in the majority and dissenting opinions in Everson v. Board of Education. Indeed, many of these opposing arguments are present in Justice Black's majority opinion, which seems to be at war with itself. Can you identify the key strands of the separationist interpretation of the Establishment Clause present in the case? What are the key strands of the accommodationist interpretation of the Establishment Clause that are evident?
2. *Everson* reflects the debate between the fundamental ideas of the American creed: liberty and equality. One fascinating aspect of Justice Black's majority opinion in *Everson* is that the first half focuses on the need for *liberty* to choose religious beliefs without government interference, coercion, or support and consequently emphasizes separationist arguments (e.g., arguments about early settlers who came to escape the bondage of religious laws, the *Memorial and Remonstrance* against taxes levied for religious purposes, the meaning of the First Amendment, the Wall of Separation).

The second half of the opinion reflects the need for *equality* and makes accommodationist arguments, which involve government neutrality toward religious groups through the distribution of benefits to all individuals regardless of religion. Can you identify the point of the shift between the concern for liberty (with its separationist implications) and the concern for equality (with its accommodationist implications)? Can you imagine an accommodationist position that fosters liberty more than equality?

B. THE AUSTRALIAN APPROACH

With language similar to that of the U.S. Constitution, Section 116 of the Australian Constitution provides that "[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." Unlike the force and effect of the religion clauses in the United States, however, these prohibitions have been interpreted narrowly and do not extend to state legislative powers in Australia. Justice Keith Mason, sworn in as president of the New South Wales Court of Appeals in 1997 and a prominent Christian, noted that Section 116 "does not preclude government aid to religious institutions and it does not prevent religious displays in the public arena" and that although Australia's "constitutionally laid back polity is free to debate prayers in Parliament and Christmas trees in public schools and public places . . . the debate does not take place in the High Court of Australia." Australian Parliaments have also stayed away from legislating in matters of religion even though they have the power to do so. Justice Mason remarked, "The practical consequence of keeping religious issues out of our Parliaments and Courts has been that, unlike our colleagues in the United States, judges in this country have not been embroiled in the often evanescent culture wars of the day."[6]

A primary example of this philosophy in Australian jurisprudence concerning the religion clauses of Section 116 can be seen the 1981 case Black v. Commonwealth, the High Court's first and only Establishment Clause decision. The case concerned a challenge to federal legislation that allowed for state aid to private schools, which were largely religious and predominantly Catholic. The Court interpreted the Establishment Clause as controlling only the purposes of government legislation, not necessarily the effects. Under this premise, the Court's majority held that the law providing for state aid did not violate Section 116 and that only a law deliberately intending to establish a national church would be prohibited by that section. This narrow interpretation of the Establishment Clause has also been adopted in application of the other religion clauses in the Australia Constitution.

6. Justice Keith Mason, Law and Religion in Australia, National Forum on Australia's Christian Heritage, Aug. 7, 2006, http://www.courtwise.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mason070806.

C. VARIETIES OF SEPARATION: BENIGN NEUTRALITY OR HOSTILITY TOWARD RELIGION

The term "separationist" can be used to cover a diverse range of regimes. This section first examines a series of positions the U.S. Supreme Court has taken that articulate divergent tests for assessing religion-state separation required by the First Amendment's Establishment Clause jurisprudence. The following section turns to varying models of the idea of a secular or lay state. What becomes evident is that a secular state may be respectful and supportive of religion and belief or may be oppressive and detrimental. In either case, the defining characteristic of a separationist state often seems to be a sequestration of the "public sphere" from the "private sphere," with religion compartmentalized in the private realm, where it may not intrude in public life and state affairs. But much depends on how the two spheres are conceptualized. Also, is it necessarily the case that the line separating religion and state always coincides with the public/private divide? Perhaps there is a conception of separation of religion and state in which both can find legitimate but independent public spheres.

1. The Three-Prong Test of Lemon v. Kurtzman

Lemon v. Kurtzman is remembered for its three-prong test, which has guided much subsequent Establishment Clause analysis. Over time, the *Lemon* test became not only the primary mechanism used by the Court in establishment cases, but one of the most controversial doctrines in the history of constitutional adjudication. Justice Scalia, for example, referred to the *Lemon* test as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," noting that "[o]ver the years . . . no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . , and a sixth has joined an opinion doing so."[7] In a milder tone, Justice Rehnquist asserted that the *Lemon* test "has produced only consistent unpredictability" and "has simply not provided adequate standards for deciding Establishment Clause cases. . . ." "Even worse," he continued, "the *Lemon* test has caused this Court to fracture into unworkable plurality opinions."[8] Justice Powell, wishing to "respond to criticism of the three-pronged *Lemon* test," argued that "the *Lemon* test has been applied consistently in Establishment Clause cases since it was adopted in 1971. In a word, it has been the law. Respect for *stare decisis* should require us to follow *Lemon*."[9]

See Chap. 13(II.A.2) on *Lemon*

7. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398 (1993) (Scalia, J., dissenting).
8. Wallace v. Jaffree, 472 U.S. 38, 110, 112 (1985) (Rehnquist, J., dissenting).
9. *Id.* at 63 (Powell, J., concurring).

LEMON v. KURTZMAN

Supreme Court of the United States, 403 U.S. 602 (1971)

Mr. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to [similar] Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. . . . We hold that both statutes are unconstitutional. . . .

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law *respecting* an establishment of religion." A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion." . . .

[The Court found no basis for a conclusion that the legislative intent was to advance religion, and also found it unnecessary to address the second of the three tests, finding that the excessive entanglement test produced the necessary holding.]

. . . Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. . . . Here we find that both statutes foster an impermissible degree of entanglement.

The District Court made extensive findings on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Salary Supplement Act.

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide

an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings the District Court concluded that . . . parochial schools involve substantial religious activity and purpose. The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. [T]he considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. . . . We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. In our view the record shows these dangers are present to a substantial degree. Religious authority necessarily pervades the school system. . . .

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.

The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion. . . . A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church. . . .

A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. The merit and benefits of these schools, however, are not the issue before us in

these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn. . . .

COMMENTS AND QUESTIONS

Does the three-prong *Lemon* test seem likely to generate separationist or accommodationist outcomes in Establishment Clause cases? Which elements of the test are likely to be most significant in deciding cases?

2. History and Tradition

In Marsh v. Chambers, a 1983 case about the constitutionality of a state legislature's hiring a chaplain to open the legislature with prayer, the Court did not mention the *Lemon* test, in spite of the fact that the court below applied to the *Lemon* test in concluding that paying a chaplain to say prayers at the Nebraska state legislature was unconstitutional, and in spite of the fact that the author of the Court's opinion was Chief Justice Burger, the author of the *Lemon* opinion. The Court instead focused on historical practice in assessing whether or not the practice violated the Establishment Clause.

MARSH V. CHAMBERS

Supreme Court of the United States, 463 U.S. 783 (1983)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause.

The Nebraska Legislature begins each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds. . . . Ernest Chambers is a member of the Nebraska Legislature and a taxpayer of Nebraska. Claiming that the Nebraska Legislature's chaplaincy practice violates the Establishment Clause, he brought this action . . . seeking to enjoin enforcement of the practice. [T]he District Court held that the Establishment Clause was not breached by the prayers, but was violated by paying the chaplain from public funds. It therefore enjoined the legislature from using public funds to pay the chaplain; it declined to enjoin the policy of beginning sessions with prayers. . . .

[The Eighth Circuit] held that the chaplaincy practice violated all three elements of the [*Lemon*] test: the purpose and primary effect of selecting the same minister for 16 years and publishing his prayers was to promote a particular religious expression; use of state money for compensation and publication led to entanglement. Accordingly, the Court of Appeals modified the District Court's injunction and prohibited the State from engaging in any

aspect of its established chaplaincy practice. We granted certiorari limited to the challenge to the practice of opening sessions with prayers by a state-employed clergyman, and we reverse.

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

The tradition in many of the Colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. A statute providing for the payment of these chaplains was enacted into law on September 22, 1789.

On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress — their actions reveal their intent. . . .

In Walz v. Tax Commission we considered the weight to be accorded to history: "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside." . . .

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[we] are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson.

We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause. Beyond the bare fact that a prayer is offered, three points have been made: first, that a clergyman of only one

denomination — Presbyterian — has been selected for 16 years; second, that the chaplain is paid at public expense; and third, that the prayers are in the Judeo-Christian tradition. Weighed against the historical background, these factors do not serve to invalidate Nebraska's practice. . . .

The Continental Congress paid its chaplain, as did some of the states. Currently, many state legislatures and the United States Congress provide compensation for their chaplains. Nebraska has paid its chaplain for well over a century. The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer . . .

The judgment of the Court of Appeals is *Reversed*.

COMMENTS AND QUESTIONS

What do you think the outcome of the case would have been if the Court had applied the *Lemon* test?

3. Endorsement

In Lynch v. Donnelly, the Court addressed the question of whether a city's Christmas display that included a crèche violated the Establishment Clause. Chief Justice Burger concluded that it did not, but the standard for evaluating such displays was unclear. Justice O'Connor's concurring opinion provided the opportunity for the introduction of a test based on whether the state's action constituted an endorsement of religion or a particular religion.

LYNCH V. DONNELLY

Supreme Court of the United States, 465 U.S. 668 (1984)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a crèche, or Nativity scene, in its annual Christmas display.

Each year, in cooperation with the downtown retail merchants' association, the city of Pawtucket, R.I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche at issue here. All components of this display are owned by the city.

The crèche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph,

angels, shepherds, kings, and animals, all ranging in height from 5" to 5'. In 1973, when the present crèche was acquired, it cost the city $1,365; it now is valued at $200. The erection and dismantling of the crèche costs the city about $20 per year; nominal expenses are incurred in lighting the crèche. No money has been expended on its maintenance for the past 10 years.

Respondents, Pawtucket residents and individual members of the Rhode Island affiliate of the American Civil Liberties Union, and the affiliate itself, brought this action in the United States District Court for Rhode Island, challenging the city's inclusion of the crèche in the annual display. [The District Court and the First Circuit held that the display violated the Establishment Clause.] We reverse. . . .

III.

. . . The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." *Walz*. The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*.

In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. *Lemon*. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. . . .

In this case, the focus of our inquiry must be on the crèche in the context of the Christmas season. . . . The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations. . . .

The District Court inferred from the religious nature of the crèche that the city has no secular purpose for the display. In so doing, it rejected the city's claim that its reasons for including the crèche are essentially the same as its reasons for sponsoring the display as a whole. The District Court plainly erred by focusing almost exclusively on the crèche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are implicated.

The city, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday. . . . These are legitimate secular purposes. We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from [the] benefits and

endorsements previously held not violative of the Establishment Clause. What was said about the legislative prayers in *Marsh* . . . is true of the city's inclusion of the crèche: its "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions." . . .

. . . Entanglement is a question of kind and degree. In this case, however, there is no reason to disturb the District Court's finding on the absence of administrative entanglement. There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the crèche. No expenditures for maintenance of the crèche have been necessary; and since the city owns the crèche, now valued at $200, the tangible material it contributes is *de minimis*. There is nothing here, of course, like the "comprehensive, discriminating, and continuing state surveillance" or the "enduring entanglement" present in *Lemon*.

We are satisfied that the city has a secular purpose for including the crèche, that the city has not impermissibly advanced religion, and that including the crèche does not create excessive entanglement between religion and government. . . .

Of course the crèche is identified with one religious faith but no more so than the examples we have set out from prior cases in which we found no conflict with the Establishment Clause. To forbid the use of this one passive symbol — the crèche — at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution. . . .

We hold that, notwithstanding the religious significance of the crèche, the city of Pawtucket has not violated the Establishment Clause of the First Amendment. Accordingly, the judgment of the Court of Appeals is reversed. *It is so ordered.*

Justice O'Connor, concurring.

I concur in the opinion of the Court. I write separately to suggest a clarification of our Establishment Clause doctrine. The suggested approach leads to the same result in this case as that taken by the Court, and the Court's opinion, as I read it, is consistent with my analysis. . . .

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders,

favored members of the political community. Disapproval sends the opposite message.

Our prior cases have used the three-part test articulated in Lemon v. Kurtzman as a guide to detecting these two forms of unconstitutional government action. It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device. . . .

The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the crèche and what message the city's display actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the city's action.

The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them the message actually conveyed may be something not actually intended. If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes. . . . The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.

Applying that formulation to this case, I would find that Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose. . . .

Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes,

even as a primary effect, advancement or inhibition of religion. . . . What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Pawtucket's display of its crèche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche. Although the religious and indeed sectarian significance of the crèche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display — as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood. The crèche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.

Additional cases involving creche displays are available in the Web Supplement.

These features combine to make the government's display of the crèche in this particular physical setting no more an endorsement of religion than such governmental "acknowledgments" of religion as legislative prayers of the type approved in *Marsh*, government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. The display of the crèche likewise serves a secular purpose — celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion. . . .

I agree with the Court that the judgment below must be reversed.

COMMENTS AND QUESTIONS

1. Would it make a difference if the crèche was the only element of the public display? A primary element? Does insistence on deemphasizing the religious elements endorse a commercial, secular or anti-religious message? From a religious standpoint, is preserving the crèche at the cost of required commercialization really a victory?
2. Is "endorsement" an improvement over "advancing" religion as an analytical focus in Establishment Clause cases?

4. Neutrality

In 1985, in Aguilar v. Felton, the Supreme Court held that the Establishment Clause barred the New York City Board of Education from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a program mandated by Title I of the Elementary and Secondary Education Act. Twelve years later, in Agostini v. Felton, the Court reversed course, finding *Aguilar* not consistent with the Court's subsequent Establishment Clause decisions. In this case the emphasis was on whether the program in question was neutral in its application between religious and non-religious beneficiaries.

AGOSTINI V. FELTON

Supreme Court of the United States, 521 U.S. 203 (1997)

Justice O'CONNOR delivered the opinion of the Court.

. . . . As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to *Aguilar* have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. . . . Second, we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid. . . .

A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries . . . might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion. . . .

Applying this reasoning to New York City's Title I program, it is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school. The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services. . . .

We turn now to *Aguilar*'s conclusion that New York City's Title I program resulted in an excessive entanglement between church and state. Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion, *Walz*, and as a factor separate and apart from "effect," *Lemon*. Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is

"excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." Similarly, we have assessed a law's "effect" by examining the character of the institutions benefited (*e.g.*, whether the religious institutions were "predominantly religious"), see *Meek*. Indeed, in *Lemon* itself, the entanglement that the Court found "independently" to necessitate the program's invalidation also was found to have the effect of inhibiting religion.

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause. . . .

To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. Accordingly, we must acknowledge that *Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law.

COMMENTS AND QUESTIONS

1. *Agostini v. Felton* signals a significant shift in the interpretation of the Establishment Clause, from an approach that focuses on freedom to an approach that focuses on equality. How is this shift evident? Is this a step in the right direction?
2. How would you describe the tests applied by the Supreme Court in the four cases summarized here? What is the relationship between the *Lemon* test, an approach that focuses on history and tradition, an approach that considers whether an action has the purpose or effect of endorsing a particular religious point of view, and an approach that focuses on neutrality and nondiscrimination? Which, if any, of these approaches seems to capture the underlying purpose and intent that motivated the adoption of the Establishment Clause?

D. THE FRENCH MODEL OF SEPARATION (*LAÏCITÉ*)

The French ideal of *laïcité* refers to a distinctively French conception of the secular state. As the French Professor Elisabeth Zoller has stated:

> *Laïcité* is often presented as a "French exception," an apt designation, at least linguistically. The term cannot truly be translated into non-Romance

> languages. In law, laïcité is always defined as the separation of church and state. When the First Article of France's 1958 Constitution defined France as a "secular Republic," it meant neither more nor less than that the French Republic is founded on the principle of separation of state and religion; it is no longer, as was the case in 1789, based on the ecclesiastical foundation of the state. Laïcité excludes religion and religions of the state; it prohibits the state from collaborating or cooperating with one religion, either in directing its organization or its functioning, or in allowing its clerics to meddle in public affairs.[10]
>
> Laïcité is a term that can be understood in two ways. On one level, laïcité signifies the separation of church and state, or of religion and politics. On another level, laïcité, as it is more or less understood in France, recalls the collection of civil, civic, and political values that come from the Declaration of the Rights of Man of 1789, the preamble to the Constitution of 1946, and the fundamental principles recognized by the laws of the Republic. These values form the moral conscience of the Republic and are the civil religion of the state.[11]

No short excerpt can hope to capture the French notion of *laïcité* in all its historical complexity and resonance. In what follows, we first note the constitutional starting points in the French legal tradition on this point, and then turn to an explication of contrasting French and (U.S.) American conceptions of *laïcité* and religious freedom in the context of the Islamic head-scarf controversy.

THE FRENCH CONSTITUTIONAL FRAMEWORK

The October 4, 1958, Constitution of France establishes France as a secular republic:

> Article 1: France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.

Articles 1 and 2 of the French Law of 1905 provide a description of what being a "secular republic" means in France:[12]

> Article 1: The Republic ensures the liberty of conscience. It guarantees the free exercise of religion, under restrictions prescribed by the interest in public order.
>
> Article 2: The Republic does not recognize, remunerate, or subsidize any religious denomination.[13]

Reaching back over a century earlier, the French Declaration of the Rights of Man in 1789 defined the limits of religious liberty:

> 10. No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.

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10. *Id.* at 561-562.
11. *Id.* at 591-592.
12. Jacques Robert, Religious Liberty and French Secularism, 2003 *BYU L. Rev.* 639.
13. *See* Law of Dec. 9, 1905, arts. 1-2, J.O., Dec. 11, 1905, p. 7205 [hereinafter Law of 1905].

Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and Laicite in France[14]

In March 2004, the French parliament adopted a law that prohibits public school students from wearing clothing and insignia that "conspicuously manifest a religious affiliation." The law was approved by an overwhelming vote of 494-36 in the National Assembly, 276-20 in the Senate, and was strongly supported by popular opinion throughout France. The momentum for adopting such a law began in March 2003, when Prime Minister Jean-Pierre Raffarin of the governing conservative party UMP (Union pour un Mouvement Populaire) said in a radio interview that Muslim headscarves should "absolutely" be prohibited in public schools. A string of endorsements for such a law followed during the next few months, culminating in a December 2003 speech by President Jacques Chirac, also of the UMP, in which he similarly proposed that a law be adopted. Although the highest French administrative court (the Conseil d'Etat) had ruled as early as 1989 that French children have the constitutional right to wear religious insignia to school, and although many scholars of religion and law believed the law would be a bad idea, the Socialist Party joined arms with the conservatives in the cause that had the support of a majority of the French population. . . .

France and the United States have some obvious underlying similarities. Their respective constitutions include the world's two oldest human rights texts that are currently in force: the French Declaration of the Rights of Man and Citizen and the American Bill of Rights. They were drafted within a few weeks of each other in the latter part of 1789. While the French may claim chronological priority in both drafting and implementation (the Bill of Rights was not ratified until 1791), Americans may claim greater continuity. The French Declaration has not had an uninterrupted tenure in the volatile world of French politics and constitutions. Nevertheless, the human rights assumptions underlying these two documents are now the recognized (if not always respected) norm in virtually every written constitution in the world as well as in all of the basic international human rights instruments.

With regard to freedom of conscience and religion, however, the two countries certainly have different linguistic starting points. Whereas in the United States the guiding principle is "religious freedom," the French use "laicite." Although "laicite" is often translated as "secular" or "secularism," the English words do not evoke the important connotations of the French. "Laicite," which was first coined in late nineteenth-century France, describes a particular attitude about the proper relationship between church and state. It derives from "laic" or "laique," words originally used to signify monastic orders whose members were not ordained to the clergy, thus corresponding very closely to the English "lay" and even "secular" in the original sense of people who had taken vows to live celibate religious lives but who were not ordained into the clergy. From the late eighteenth to the early twentieth century, the terms laic and then laicite came to refer to policies designed to restrict (or even eliminate) clerical and religious influence over the state. Ironically,

14. T. Jeremy Gunn, 46 *J. Church & State* 7 (2004).

the word laic thus evolved from having a distinctly religious meaning, to later becoming anti-clerical, and ultimately meaning, at least for some, "anti-religion." (Many Americans similarly believe that "secular" means "anti-religious" rather than "non-religious.") Unlike France, where "laicite" might have the connotation of the state protecting itself from the excesses of religion, the term "religious freedom" in the United States would be more likely to have the connotation of religion being protected from the excesses of the state. Thus Americans are more likely to be predisposed to have suspicions about state laws regulating religion while the French are more likely to be suspicious of an absence of regulation of religious activity. At least this is the theory.

The popular rhetoric in each country transforms the basic attitudes about laicite and religious freedom into what can be called "founding myths." These myths are often described as embodying the unifying values of freedom, neutrality, and equality on which the respective republics were founded, but also as constituting an essential dimension of their unique identities. The French identity, as imagined, includes the comforting belief that the state protects its citizens from religious excesses. The American identity, as imagined, is that "we are a religious people." Thus laicite and religious freedom, although defined as embodying neutrality, tolerance, equality, and freedom of conscience, are at risk of being applied in ways that divide citizens on the basis of their beliefs and convictions.

Two controversies in France and the United States involving religion in the public schools illustrate the parallel uses of the myths of "laicite" and "religious freedom" to reinforce popular notions of national identity. In the name of laicite, the French National Assembly has now adopted (with the support of the majority of the population), a law prohibiting children from wearing conspicuous religious clothing and insignia at public schools, including Islamic headscarves (voiles), Jewish skullcaps (kippas), and Christian crosses. Similarly, in the name of "religious freedom," the American political establishment and much of the judiciary (with widespread popular support), insists that public school officials should lead children in reciting a pledge of allegiance declaring that the United States is "one Nation under God" and that this practice should be defended against a constitutional challenge. "Neutrality" and "equality" are used in France to prevent religious expression in schools; "neutrality" and "equality" are used in the United States to propagate state-sponsored theological declarations in schools.

French and American observers are likely to see the state actions on the opposite side of the Atlantic — banning religious clothing and promoting state-sponsored declarations about God — as violating the very principles of neutrality, tolerance, freedom of conscience, and human rights that their own countries scrupulously respect. Easily spotting the speck in the other's eye, they are blind to obstacles in their own. . . .

In July 2003, after several of the leading politicians in France had recommended the adoption of a law to ban religious attire from public schools, President Chirac appointed a group of prominent French scholars and officials to make its own recommendations. Known as the "Stasi Commission" (after its chairman, Bernard Stasi), it issued its report in early December 2003. The Commission made several recommendations, including improving living

standards in some economically depressed communities and improving education about religion and laicite. The media, however, focused almost exclusively on only one of the Commission's recommendations: prohibiting public school students from wearing "clothing and insignia signifying a religious or political affiliation." Although phrased in the neutral words of "clothing" and "insignia," the media immediately interpreted it to be a recommendation to prevent Muslim girls from wearing headscarves in schools.

The Stasi Commission's report began with a lengthy praise of the doctrine of laicite. Although the encomiums were somewhat less flowery than those of President Chirac, the admiration was unmistakable. Among the admired aspects of laicite were its respect for neutrality and equality. The Commission of course recognized that its function was not simply to praise laicite, nor even to discuss religious clothing generally, but to address specifically the Islamic headscarf, which it characterized as the "explosive" issue. When we focus specifically on the Commission's treatment of the issue that prompted its creation and that served as the basis of its most prominent recommendation, it is disappointing to see just how shallow the Commission's analysis was. Though its report was seventy-eight pages in length, only a few short pages even discussed the core issue of headscarves or other religious clothing. And here the Commission's analysis is surprising both for what it says and what it does not say.

First, the Commission does not assert that the wearing of headscarves (or other religious attire) is becoming increasingly disruptive in schools. In fact, the Commission makes no attempt at all to quantify the alleged problem or to identify trends — a rather striking omission for a group with such serious scholars among its members. The Commission failed even to note that the responsible official from the Ministry of Education — who was herself a Member of the Commission — had reported earlier in the year that the number of problematic cases had been sharply reduced.

Second, the Commission did not analyze or consider any reasons or religious motivations for why children might want to wear religious clothing or insignia to school. The Commission did not consider whether the wearing of headcoverings by Jewish boys or Muslim girls was prompted by religious piety, personal modesty, or cultural identification. The Commission's report never even considered the rights of religion or belief that might be infringed if its recommendation to ban religious clothing were adopted or why its analysis should supersede that of the Conseil d'Etat that had held children have a constitutional right to wear such clothing. This is probably the most striking omission and failure in the report.

Third, the Commission responded to the allegation that some families and communities coerce (and even threaten) Muslim girls into wearing the headscarf. The Commission was deeply disturbed about such undue pressure on the girls and asserted that the French state has an obligation to protect these vulnerable children. It also feared that community pressure on the girls was contributing to sex segregation and an inferior status for Muslim girls and women. While the Commission was certainly correct to identify these serious issues, its analysis as a whole suggests that it had a rather erratic concern about coercion. Whereas it condemned coercion to wear the headscarf, it revealed no comparable interest in coercion not to wear the headscarf. Although there is in France

strong media, school, popular, and political antagonism directed at the wearing of the headscarf, the Stasi Commission failed to criticize this coercion. Its selective concern with coercion was further revealed in its discussion of Jewish boys who are ridiculed and threatened when they wear the skullcap. Whereas the Commission had argued that the state has a responsibility to protect girls who do not want to wear the headscarf, it did not see any responsibility of the state to ensure that boys who wish to wear the skullcap are protected in this choice against coercion and harassment. . . .

Finally, the Commission offered no analysis to show that its recommendation — banning religious clothing — would ameliorate the problems that it identified: coercion and sexual discrimination. Indeed, even if we accepted the Commission's explanation of why girls wear the headscarf (community harassment if they do not comply), we are offered no analysis to show why banning the headscarf at schools would solve the problem. In fact, if the Commission's underlying analysis about coercion is true, we can well imagine the possibility that community threats on the unfortunate girls will increase if they are forced to unveil themselves in schools. We also can imagine, again assuming that the Commission's explanation is correct, that girls suffering from coercion might withdraw from state schools and be placed in private religious schools, thereby exacerbating the sex segregation that the Commission professedly deplores.

If we step back for a moment and look globally at what the Commission did, there are two important observations. First, it did not take seriously the rights of conscience and belief of the children. Second, the solution offered — banning religious attire in public schools — is not shown to solve the problem the Commission identified and it may well be counterproductive. Thus it appears that the Commission was perhaps less interested in eliminating coercion and sex segregation than it was in recommending that schools have the appearance of laicite. The Commission could have said that "what unites us as French citizens is our respect for the choices of individuals to believe or not to believe as their consciences dictate." Unfortunately, the Commission essentially said that "what unites us as French citizens is a particular notion of laicite that abhors the appearance of religious differences in schools." The Commission's application of neutrality and equality means that everyone has the equal right not to wear religious clothing. . . .

Though laicite and religious freedom were not the founding principles of tolerance and neutrality as the rhetoric sometimes suggests, it is important to recognize that they have made some important and positive contributions. One of the principal values of laicite is the official respect it accords for beliefs that are not religious, and for recognizing the human dignity of the many people who do not find strength or value in religion. Whether such nonbelievers are scientists, philosophers, doctors, political leaders, or day laborers, they are officially respected by a laic state for their profound contributions to society, and they are valued as people who are fully entitled to participate in the political world and in public discourse.

With regard to the United States, there has emerged — albeit more recently than the myth implies — a very healthy presumption that people of widely divergent religious beliefs should be protected by the state and that respecting

religious freedom positively aids the health and strength of the state. Such policies and attitudes are not only fully consistent with international human rights standards that protect freedom of religion, they are also deeply respectful of human dignity and individual choice to devote all or part of one's life to religion. While much of the world becomes increasingly secular and skeptical, and while other parts of the world seem to be increasingly religious, it is no small accomplishment for the United States to be in the vanguard of stimulating scientific discovery and protecting freedom of religion.

COMMENTS AND QUESTIONS

1. The *Şahin* decision excerpted in Chapter 3 was pending before the European Court of Human Rights at the time of the Stasi Commission hearings and the adoption of the law banning clothing and insignia that "conspicuously manifest a religious affiliation." The initial judgment from the European Court was handed down on June 29, 2004, less than four months after the French law was adopted. The grand chamber decision followed on November 10, 2005. The *Şahin* decision technically involved Turkey, but was obviously not oblivious to the parallel issues in France. Could a French applicant challenging the French anti-headscarf law distinguish the French and Turkish situations?
2. One of the worries behind the *Şahin* decision in Turkey is that those wearing headscarves represent political pressure to move toward a more Islamic state. A classic Islamic model is one in which various religious communities are each allowed to coexist in the country with their own religiously based legal systems. In a sense, the model of *laïcité* or Turkish secularism could be understood as a response to the possibility of this type of legal pluralism and the religious status systems that result. At what point does the risk of transformation into a radically different type of system justify stronger intervention in religious affairs and stronger control of religious expression and symbols in public settings?
3. Gunn suggests that religious liberty in the United States and *laïcité* in France have taken on the aura of "founding myths." Would you agree? Do the myths blind us to some of the underlying realities, both in terms of what happened historically and in terms of how we apply the concepts today? Often a myth, particularly a founding myth, contains a deep core of cultural truth. Taken in that sense, what do the competing ideals of religious liberty and *laïcité* reveal about the U.S. and French cultures?
4. Is there a meaningful distinction to be drawn between secularity, understood as a framework that treats competing religious and non-religious viewpoints equally, and secularism, as a substantive ideology that tries to monopolize life and discourse in the public sphere?

Additional Web Resources:	Substantial additional materials are available regarding religious status systems. These include materials on Israel and on millet systems in a number of Islamic countries.

V. HAZARDS OF EXCESSIVE POSITIVE OR NEGATIVE IDENTIFICATION

THE MILITANTLY SECULAR STATE: THE EXAMPLE OF ALBANIA

With the swift rise of communism in Albania following World War II came the near complete extinction of religious liberty. Enver Hoxha, the head of the Communist Party, considered religion anti-socialist and divisive, and actively sought the eradication of religious institutions. Most property owned by religious institutions was nationalized; many clergy and believers were put on trial, tortured, and killed; and foreign priests were expelled. Although the communist constitution guaranteed religious freedom in theory, the government imposed substantial burdens on religious institutions in practice. For example, the Decree on Religious Communities, passed in January 1949, severely sanctioned religious communities, requiring government approval for all appointments and practices, terminating the activities of those with foreign headquarters, forbidding them from educating the young, and denying them the right to own land and operate charitable institutions.

The U.S. Library of Congress provides the following description of Hoxha's anti-religious campaign:[15]

> Although there were tactical variations in Hoxha's approach to each of the major denominations, his overarching objective was the eventual destruction of all organized religion in Albania. In the late 1940s and 1950s, the regime achieved control over the Muslim faith by formalizing the split between the Sunni and Bektashi sects, eliminating all leaders who opposed Hoxha's policies, and exploiting those who were more tractable. Steps were also taken to purge all Orthodox clergy who did not yield to the demands of the regime, and to use the church as a means of mobilizing the Orthodox population behind government policies. The Roman Catholic Church, chiefly because it maintained close relations with the Vatican and was more highly organized than the Muslim and Orthodox faiths, became the principal target of persecution. Between 1945 and 1953, the number of priests was reduced drastically and the number of Roman Catholic churches was decreased from 253 to 100. All Catholics were stigmatized as fascists, although only a minority had collaborated with the Italian occupation authorities during World War II.
>
> The campaign against religion peaked in the 1960s. Inspired by China's Cultural Revolution, Hoxha called for an aggressive cultural-educational struggle against "religious superstition" and assigned the antireligious mission to Albania's students. By May 1967, religious institutions had been forced to relinquish all 2,169 churches, mosques, cloisters, and shrines in Albania, many of which were converted into cultural centers for young people. As the literary monthly Nendori reported the event, the youth had thus "created the first atheist nation in the world."

15. Library of Cong., Albania: A Country Study, in *Religion: Hoxha's Antireligious Campaign* (Raymond Zickel & Walter R. Iwaskiw, eds., 1994), available at http://lcweb2.loc.gov/frd/cs/altoc.html.

> The clergy were publicly vilified and humiliated, their vestments taken and desecrated. Many Muslim mullahs and Orthodox priests buckled under and renounced their "parasitic" past. More than 200 clerics of various faiths were imprisoned, others were forced to seek work in either industry or agriculture, and some were executed or starved to death. The cloister of the Franciscan order in Shkodër was set on fire, which resulted in the death of four elderly monks. . . .
>
> Hoxha's brutal antireligious campaign succeeded in eradicating formal worship, but some Albanians continued to practice their faith clandestinely, risking severe punishment. Individuals caught with Bibles, icons, or other religious objects faced long prison sentences. Parents were afraid to pass on their faith, for fear that their children would tell others. Officials tried to entrap practicing Christians and Muslims during religious fasts, such as Lent and Ramadan, by distributing dairy products and other forbidden foods in school and at work, and then publicly denouncing those who refused the food. Clergy who conducted secret services were incarcerated; in 1980, a Jesuit priest was sentenced to "life until death" for baptizing his nephew's newborn twins.

In 1967 the government officially outlawed religion and announced that all previous decrees establishing organized religious institutions were null and void. Nearly a decade later,

> [t]he culmination of this so-called revolution was reached with the Constitution of 1976. The preamble of this Constitution declared that the bases of religious obscurantism were destroyed. Further, the 1976 Constitution provided that the Albanian state did not recognize any religion and carried out atheist propaganda in order to introduce new scientific materialistic ideas. Also, the Constitution prohibited the establishment of any religious organizations and equated them with organizations of fascist, anti-democratic, and antisocialist character. The Albania state considered itself the first atheist state in the world.[16]

With the fall of communism in 1990 came the rebirth of religious freedom in Albania. In 1991 while laying the groundwork for a new constitution, the People's Assembly adopted the Law on the Main Constitutional Provisions, which reflected principles of religious freedom from the pre-communist era, such as the secular status of the government and its responsibility to protect freedom of religious belief and create an environment in which that belief can be safely expressed. The bill of rights declared the inviolability of freedom of thought, conscience, and religion. Finally, the law guaranteed the freedom to change religion or manifest, publicly or privately, religious beliefs.

In November 1998 the Albanian government approved its post-communist constitution, which has been found to meet international standards for the protection of religious rights and freedoms.[17] Since that time there has been a significant improvement in the protection of religious freedom in Albania. According to a U.S. State Department report issued in 2008, "[t]he Constitution provides for freedom of religion, and other laws and policies contributed to the generally free practice of religion. The law at all levels protects this right in full

16. Evis Karandrea, Church and State in Albania, in *Law and Religion in Post-Communist Europe* 26-27 (Silvio Ferrari, W. Cole Durham, Jr., & Elizabeth A. Sewell, eds., Peeters 2003).

17. *Id.*

against abuse, either by governmental or private actors."[18] However, although the constitution guarantees that "there is no official religion and all religions are equal . . . the predominant religious communities (Sunni Muslim, Bektashi, Orthodox, and Catholic) enjoy a greater degree of official recognition (e.g., national holidays) and social status based on their historical presence in the country."[19]

COMMENTS AND QUESTIONS

1. The Albanian case is one of the extreme cases of religious persecution in history. What are the social and political dynamics that can lead to the transformation of a regime located between cooperation and secularism on the religion-state identification continuum into a control or abolitionist regime?
2. What is the more likely precursor of an abolitionist or strong control regime: an established religion or a laicist regime?
3. After 1990, many formerly communist regimes went through a process of transition toward more democratic regimes. All of these countries have experienced significant transformations in the development of market economies, the strengthening of democratic political traditions, and improved performance in the domain of human rights, including the right to freedom of religion or belief. As a regime tries to move out of the strong "negative identification" position, what are the best options for adjusting the religion-state system to optimize religious freedom? In many of these countries, a major issue has been restitution of property to religious communities that had been expropriated by the former communist regime. This obviously involves massive transfers of property to the historically dominant religion or religions in the country. Should this be regarded as a violation of separation principles? Many of the indigenous religions had suffered crippling blows from persecution during the communist era. Should this justify intensified "cooperation" in the form of financial aid to various religious communities? Should the state raise "barriers to entrance" against other religious groups while the indigenous communities rebuild? Should different principles of freedom of religion apply during periods of transition that allow states greater flexibility to aid or inhibit religion? Or do periods of transition provide opportunities to make major leaps forward in strengthening human rights protections?

Additional Web Resources:	Substantial additional materials are available regarding control and abolitionist regimes. In particular, there are substantial sets of materials on China (as an example of a control regime), and on Russia and other Central and Eastern European countries as examples of control regimes in various stages of transition toward democracy.

18. Bureau of Human Rights, Democracy, and Labor, U.S. Dep't of State, International Religious Freedom Report 2007 (2007), available at http://www.state.gov/g/drl/rls/irf/2007/90160.htm.
19. *Id.*

VI. CONCLUSION

While it cannot be said that any one type of church-state relationship automatically yields "ideal" or "optimal" results across all legal systems, in that it maximizes freedom for believers, non-believers, and the unconcerned, the institutional relationships between religion and the state do tend to raise predictable sets of challenges for freedom. Some systems appear to be more conducive to broad protection of freedom of religion or belief, and others appear more prone to lapse into excessive positive or negative identification with religion. As we proceed through the remaining chapters of the book, we hope the comparative framework developed here will lend depth to analysis of the recurrent types of problems regimes face in dealing with the interface of religion, the state, and society.